TO: Samuel L. Feder, General Counsel
Matthew Berry, Deputy General Counsel
Federal Communications Commission

FROM: Uzoma C. Onyeije, Vice President, Legal and Regulatory Affairs, M2Z Networks, Inc.

RE: Written Ex Parte Presentation: Litigation Risk Associated with Proposed Draft Order in WT Dockets Nos. 07-16 and 07-30

DATE: August 30, 2007

Over the past few weeks, M2Z Networks, Inc. ("M2Z") has contacted the office of each FCC Commissioner to discuss how the National Broadband Radio Service ("NBRS") proposed in M2Z's application could come to market through various assignment mechanisms, including an auction. We will diligently pursue these discussions to ensure an outcome in these proceedings that reflects the public's interest in the Commission establishing a free, fast, and family-friendly broadband service. Nevertheless, we believe it is necessary to fully apprise you of the legal defects that we believe exist in the current item on circulation related to M2Z.

Therefore, this memorandum follows up on the ex parte letter that I sent to you earlier today seeking a meeting and briefly outlining some of M2Z's concerns and M2Z's e-mail correspondence with Mr. Berry to do the same.[1] To provide the Office of General Counsel with a better sense of the litigation risk for the Commission concerning these proceedings, this letter provides a more detailed discussion. As explained below, we believe that the current item on circulation at the Commission has several defects:

- The order is contrary to law and would violate:
    - The Due Process Clause of the Fifth Amendment
    - The Administrative Procedures Act

[1] We understand that as of today you are on paternity leave due to the birth yesterday of your children. For that reason, this memorandum is also addressed to Mr. Berry.

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  - Section 1 of the Communications Act
  - Section 7 of the Communications Act
  - Section 10 of the Communications Act
  - Section 309 of the Communications Act
  - Section 706 of the Telecommunications Act of 1996
- The order is arbitrary and capricious.
- The order is not supported by substantial evidence in the record.
- The order is not reasonably explained.

Introduction

Our assessment of the litigation risk presented by the proposed order is premised on our understanding that the proposed order would deny M2Z's application and its related forbearance petition. We further understand that the order is brief and does not contain a comprehensive review of the record developed in the application and petition. We also understand that a proposed Notice of Proposed Rulemaking ("NPRM") is circulating which would not reach a final determination concerning the spectrum for which M2Z is seeking a license. This understanding is based on trade press reports and our own advocacy before the Commission, and our information is limited.

As outlined below, we have identified numerous problems, both procedural and substantive, with the proposed approach, as we understand it. Each of these pose separate vulnerabilities on appeal, and, we believe, cumulatively would present an even more compelling case to the court that the Commission has not duly executed its statutory obligations under the Communications Act of 1934, as amended, and the Administrative Procedure Act.

We believe that the uniquely compounded nature of these problems, and the irreparable harm that has been caused to M2Z, would provide a basis for the court to

institute an equitable remedy, including a judicial order to compel the FCC to issue the license that M2Z seeks.[2] We explain below.

I. Procedural History

On May 5, 2006, M2Z filed with the Commission an application requesting an exclusive fifteen-year, renewable license to operate a nationwide wireless broadband network on spectrum in the 2155-2175 MHz band (referred to herein as the "Application," "M2Z Application" or "M2Z's Application").[3] On September 1, 2006, M2Z filed a Petition for Forbearance ("Forbearance Petition")[4] with the Commission,

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[2] We believe that M2Z would be able to satisfy the standard for equitable relief applied by the reviewing court. Courts consider four factors in determining whether to issue a preliminary injunction or award other equitable relief: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if relief is denied; (3) whether third parties will be harmed by the relief; and (4) whether the relief serves the public interest. *See, e.g.*, *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977). First, for the reasons mentioned herein, M2Z would be able to convince the court of its likelihood of success on the merits. Second, M2Z would be able to show that anything short of a grant of the license would cause it irreparable harm. There has already been a significant shift in the financial markets since May 5, 2007, the date by which the Commission should have acted on M2Z's Application. The risk of further delay, through the use of dilatory tactics and unorthodox procedures by the Commission, is too great, in view of the capital-intensive nature of M2Z's proposed network build-out and the rapidly changing nature of the financial markets, to allow the Commission the opportunity for more mischief. Third, no third party would suffer a cognizable harm as a result of a license grant. Although alternative proposals were submitted for the spectrum sought by M2Z, no such proposals provided anywhere near the public interest benefits that would be generated by M2Z's proposal. Moreover, unlike M2Z's license application, none of these proposals were accepted for filing by the Commission. As a result, no other party except M2Z has a legitimate claim to the license under the federal laws discussed herein. Fourth, M2Z is confident that it could convince a reviewing court that a grant of the license (and the rapid deployment of its broadband network that would result from such a grant) would be in the public interest. Indeed, the bulk of the record developed at the Commission amplifies this point.

[3] *See* M2Z Networks, Inc., Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16, at 2–3 (filed May 5, 2006, and amended Sept. 1, 2006) ("Application").

[4] *See* Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(a) and (c) of the Commission's Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-30, at 2 (filed Sept. 1, 2006) (the "Forbearance Petition"). The Commission subsequently solicited comments on the Forbearance Petition and established a pleading cycle for such comments in a separate docket. *See Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its Application for a License to Provide Radio Service in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-30, DA 07-736, (Wireless Telecom. Bur. rel. Feb. 16, 2007) (the "Forbearance Public Notice").

pursuant to Section 10 of the Act, 47 U.S.C. § 160. Following these filings, the Commission's review of the Application and the Forbearance Petition has been marked by some significant irregularities.

On January 31, 2007, nearly nine months after M2Z's Application was filed, the Wireless Telecommunications Bureau issued a three page Public Notice (the "Public Notice") accepting the Application for filing, seeking comment on the Application, and inviting alternative proposals to operate in the 2155-2175 MHz band.[5] With so much time expired before seeking comment on M2Z's application, the Commission had just over three months to assemble a record and make a public interest determination within the statutorily mandated one year timeframe.[6] On February 16, 2007, more than five months after M2Z's Forbearance Petition was filed, the Wireless Telecommunications Bureau issued a public notice seeking comment on the Forbearance Petition.[7] The Forbearance Public Notice stands in stark contrast to the Commission's policy of issuing public notices on forbearance petitions immediately.[8]

On March 2, 2007, several parties filed petitions to deny M2Z's Application, consistent with the timing for such filings in the Commission's Part 1 rules.[9] On March 9, 2007, the Wireless Telecommunications Bureau, deviating from the Commission's established rules and procedures,[10] issued a public notice (the "March Public Notice") establishing a pleading cycle that extended the deadline for petitions to deny and other

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[5] *Wireless Telecommunication Bureau Announces that M2Z Networks, Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing*, Public Notice, WT Docket No. 07-16, DA 07-492 (Wireless Telecom. Bur. rel. Jan. 31, 2007) (the "Public Notice").

[6] *See* 47 U.S.C. § 157.

[7] *Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its Application for a License to Provide Radio Service in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-30, DA 07-736, (Wireless Telecom. Bur. rel. Feb. 16, 2007) (the "Forbearance Public Notice").

[8] Appendix II attached below highlights the amount of time it took for the Commission to issue a public notice for those forbearance petitions that were filed in the year prior to M2Z's Petition.

[9] *See* 47 C.F.R. § 1.939(a)(2).

[10] *Id.* The Commission's rules provide that petitions to deny an application subject to Section 309(d) of the Act must be filed no later than thirty days after the date of the public notice listing the application as accepted for filing.

filings pertaining to the Application.[11] This action had a direct negative impact on M2Z as three additional petitions to deny or comments opposing grant of the Application were filed prior to the March 16 deadline established in the March Public Notice,[12] along with one additional alternative proposal submitted by a party that also filed a petition to deny.[13]

The M2Z Application was accepted for filing 7 months ago. There is, however, no statutory mandate that requires such a lengthy period of consideration. In fact, under the Communications Act, the Commission was empowered to grant M2Z's Application as early as March 3, 2007.[14] Throughout this proceeding, M2Z explained to the Commission,[15] as well as Congress,[16] that the Section 7 statutory deadline was May 5, 2007. Despite those reminders, no FCC action was taken prior to the congressionally-imposed time limit.

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[11] *Wireless Telecommunication Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-16, DA 07-987 (Wireless Telecom. Bur. rel. Mar. 9, 2007) (the "March Public Notice").

[12] *See* Consolidated Petition to Deny and Comments of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 15, 2007) ("TowerStream Petition to Deny"); Consolidated Petition to Deny and Comments of the Rural Broadband Group, WT Docket No. 07-16 (submitted Mar. 16, 2007) ("Rural Broadband Group Petition to Deny"); Comments of the Information Technology Industry Council, WT Docket No. 07-16 (submitted Mar. 16, 2007) ("ITI Comments").

[13] Proposal of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 16, 2007) ("TowerStream Proposal").

[14] *See* 47 U.S.C. § 309(b).

[15] *See* Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(b) and (c) of the Commission's Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-30 (filed Sept. 1, 2006); *See* Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny, WT Docket Nos. 07-16 & 07-30 at 23-27 (filed Mar. 26, 2007); *See* Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals, WT Docket Nos. 07-16 & 07-30 at 18-52 (filed Mar. 26, 2007); *See* Opposition of M2Z Networks, Inc. to NextWave Motion for Extension of Time and AT&T Comments at 4 (filed April 2,2007); *See* M2Z Networks, Inc. *Ex Parte* Response to Replies and Oppositions, WT Docket Nos. 07-16 & 07-30 at 18-23 (filed Apr. 16, 2007).

[16] *See* M2Z *Ex Parte* Letter WT Docket Nos. 07-16 & 07-30 (filed April 19 2007) (submitting testimony of John B. Muleta before the House of Representatives Subcommittee on Telecommunications and the Internet on April 19, 2007).

Approximately two weeks ago, press reports stated that a draft Order had been circulated to the Commission denying M2Z's Application and Forbearance Petition.[17] M2Z also learned of this action through Chairman Martin's Acting Legal Advisor, Erika Olsen. We also understand that the draft Order is:

(1) exceedingly short and is still being revised;

(2) does not thoroughly address the economic analyses and other supporting information submitted in favor of M2Z's requests;

(3) fails to address in a detailed manner the public interest and forbearance petition showings submitted by M2Z and its supporters in the record;

(4) fails to acknowledge that the Commission had been required under Section 7 of the Communications Act, 47 U.S.C. § 157, to issue a final decision in response to M2Z's Application by May 5, 2007;

(5) fails to apply adequately Section 7's requirement that opponents of proposals for new services and technology have the burden of demonstrating that grant of the proposals would not be in the public interest;

(6) fails, contrary to the requirements of 47 U.S.C. §§ 309(j)(6)(E) and (3), to properly conduct an analysis of whether it is in the public interest to force, by denying M2Z's Application and Forbearance Petition, a time-consuming regulatory process that will result in mutual exclusivity (and therefore an auction) with respect to applications for the 2155-2175 MHz license sought by M2Z;

(7) fails to apply, consistent with Commission and court precedent, all three prongs of the test for evaluating forbearance petitions set forth in Section 10 of the Act, 47 U.S.C. § 160; and

(8) fails to consistently apply the Commission's previous interpretations of Section 706 of the 1996 Telecommunications Act, 47 U.S.C. § 157 nt, and the Commission's deregulatory policies based on such statute, in its treatment M2Z's Application and Forbearance Petition.

[17] *See* "M2Z Targeted for Dismissal," Communications Daily, 1-2 (Aug. 15, 2007); "M2Z to Ask Court to Force FCC to Make Public Interest Determination on 2.1 GHz License," TR Daily 1 (Aug. 15, 2007).

We understand that the desired resolution of the matter is by September 1, 2007, so as to release a written Order in response to M2Z's Application and Forbearance Petition issued by September 1, 2007. We also understand that the September 1, 2007 date relates to a litigation position that might be argued to a reviewing court and advanced to others interested in ensuring Commission compliance with Section 7,[18] including members of Congress, that the Commission had also satisfied the requirements of Section 7, by issuing a decision in response to M2Z's Application within one year of the date M2Z, in its Forbearance Petition, invoked Section 7. Despite the flawed nature of this reasoning – M2Z filed its Application for approval of a new service using new technology on May 5, 2006 and nowhere in Section 7 does it state that a proposal for a new service using new technology must actually invoke Section 7 in order for the provision to apply – some at the Commission apparently believe that a tersely written decision denying M2Z's requests that is issued by September 1, 2007 is sufficient to fulfill the Commission's statutory obligations.

II. Litigation Risk Assessment

In view of the foregoing, it is our view that any Commission decision like the proposed Order reportedly now on circulation would be vulnerable to judicial attack on several substantive legal grounds under the Administrative Procedure Act and other relevant provisions. As we briefly outline below, the record indicates that the Commission's proposed order, would be vulnerable to challenge as (1) contrary to law, (2) arbitrary and capricious, (3) not supported by the record and (4) not sufficiently reasoned.[19]

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[18] Section 7(b) provides that the Commission "shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed." 47 U.S.C. § 157(b).

[19] An agency action will be set aside as a violation of the Administrative Procedure Act ("APA") if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." (*See* 5 U.S.C. § 706(2)(A)) Agency action is also infirm to the extent it is "contrary to constitutional right, power, privilege, or immunity," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." (*See Id.* § 706(2)(C)-(E)) Accordingly, the Commission may not deprive any person or entity of property without the due process of law guaranteed by the Fifth Amendment or violate any statutory command enacted by Congress. Agency action will be held arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (*See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) "Although the arbitrary and capricious standard of review is

(1) Contrary to Law

Section 7

The Commission is bound by Section 7 to make a public interest determination regarding M2Z's Application, and anything less than a comprehensive review of such application would be contrary to law.[20] Section 7 imposes an affirmative duty on the Commission to act on new service or technology proposals within one year (which passed on May 5, 2007).[21] The record contains M2Z's early and repeated notifications that its Application proposes the creation of a "new service (nationwide free and family friendly wireless broadband) through a host of new technologies (TDD, AAS, OFDMA, SDMA) in the 2155-2175 MHz band," [22] a band that has, thus far, not been used to provide such services. Even Verizon Wireless, an opponent of the Application, agrees that the NBRS, M2Z's proposed new services, would indeed be a new service, stating

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deferential, the court will intervene to ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action. Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [a reviewing court] must undo its action." (*See BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999) (quotation marks and brackets omitted). The agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (*See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. *See also Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) ("The Commission did not even attempt to explain why forbearance is not appropriate or . . . indeed, the Commission denied forbearance without ever considering the requirements of § 10."); *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001) ("[U]ntil the Commission has adequately explained the basis for [its] conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act.") (holding that the Commission erred in denying a petition for forbearance). Finally, when an agency departs from its own precedents it must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *(See Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C.Cir.1970).) An agency's failure to come to grips with conflicting precedent constitutes "an inexcusable departure from the essential requirement of reasoned decision making." (*See Columbia Broad. Sys. v. FCC,* 454 F.2d 1018, 1027 (D.C.Cir.1971).

[20] Section 7 was enacted specifically to: (1) "encourage the availability of new technology and services to the public"; (2) prevent the Commission from "hamper[ing] the development of new services"; and (3) allow "the forces of competition and technological growth [to] bring many new services to consumers." Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984) ("Dingell Remarks").

[21] *See, e.g. Forbearance Petition at 16-18; M2Z Opposition at 23-27; M2Z Motion to Dismiss at 15-18.*

[22] *See* M2Z *Ex Parte* Letter (Aug. 23, 2007) at 1.

that "[h]ere, M2Z is plainly seeking an entirely new license for an entirely new service, rather than a modification of an existing license." [23] Thus, the Commission cannot issue a decision on M2Z's Application and Forbearance Petition unless it examines in detail the particular public interest benefits of the proposed NBRS under the favorable standards set forth in Section 7.

Moreover, Section 7(a) provides that parties opposing a new technology or service "shall have the burden to demonstrate that such proposal is inconsistent with the public interest."[24] This burden-shifting requirement "is intended to shift the balance of the process in favor of new services"[25] and creates "a presumption that new services are in the public interest."[26] Any Commission decision not to grant M2Z's Application would need to explain in detail how opposing parties have met this burden when the record reflects that M2Z has addressed all of their stated concerns. (For example, M2Z has addressed concerns related to the protection and relocation of incumbents,[27] M2Z's proposed buildout schedule,[28] financial qualifications,[29] and technical qualifications,[30] public safety concerns,[31] "windfall" and unjust enrichment concerns,[32] Anti-Deficiency

[23] *See* Verizon Wireless Petition to Deny at 10.

[24] *See* 47 U.S.C. § 157(a) ("Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest."). Furthermore, Section 309(d)(1) itself also places the burden on Petitioners to set forth in their petitions to deny "specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with" the public interest. As demonstrated in M2Z's filings, all of the Petitioners failed to make such a prima facie showing.

[25] *See* Dingell Remarks, at E74.

[26] *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, Memorandum Opinion and Order, 98 F.C.C.2d 792, ¶ 24 (1984).

[27] Application at 19-21; Forbearance Petition at 38-41; M2Z Opposition at 88-98; M2Z Reply Comments at 27-29.

[28] Application at 23; M2Z Opposition at 101-02; M2Z Reply Comments at 25-26.

[29] Application at 6-7 and Appendix 1; M2Z Opposition at 111-14; M2Z Motion to Dismiss at 45-46; M2Z Request for Confidential Treatment.

[30] Application at 6-7 and Appendix 1; M2Z Opposition at 111-14; M2Z Motion to Dismiss at 45-46.

[31] M2Z Opposition at 16-18; M2Z Application at 24-26; M2Z Reply Comments at 29-30; M2Z White Paper "Communicating Effectively When Disaster Strikes."

[32] Application at 26, 31-32; Forbearance Petition at 46-49; M2Z Opposition at 61-69, 73-74, 103-06; Wilkie Study on Consumer Welfare Impact at 19-20; M2Z Reply Comments at n.24, 26-27.

Act and Miscellaneous Receipts Act standards,[33] and the need for a separate and lengthy service rules proceeding for the band.[34])

Because no issues or concerns remain unaddressed, and none of the parties that oppose M2Z's requests have carried their burden of demonstrating that M2Z's proposal is inconsistent with the public interest, there is significant litigation risk that the Commission would be in violation of Section 7(a) (and therefore the APA) if it ended up adopting the draft Order in its present form. Indeed, any Commission Order concerning this matter would have to further explain how M2Z's opponents have met their high burden of proof in light of the fact that the bulk of the public interest showing made by M2Z and its supporters, comprising hundreds of filings, has never even been rebutted by M2Z's opponents.[35]

Another flaw inherent in the draft Order is its apparent treatment of the one-year deadline contained in Section 7(b). The plain language of Section 7 states that the Commission must act within one year of the filing of an application or petition involving a new service or new technology. Nothing in the plain language requires the applicant or petition to invoke applicability of the statute or to incant particular words to do so. Yet, an order that treats September 1, 2007 as the applicable deadline for Section 7 would read into Section 7 such a requirement. Such a construction is untenable because courts must interpret a statute "as a symmetrical and coherent regulatory scheme,"[36] and "fit, if possible, all parts into an harmonious whole."[37] Thus, "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute."[38] As a result, "[s]tatutes must be interpreted, if possible, to give each word some operative effect."[39] It is indeed an

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[33] M2Z Opposition at 106-09.

[34] Application at 13-21, 40-43; M2Z Opposition at 75-84, 98-99; Forbearance Petition at 3-14.

[35] *See, e.g.* M2Z *Ex Parte* Letter, WT Docket Nos. 07-16 & 07-30 (filed April 18, 2007) at Attachment C, pages 9 & 10 (summarizing the record of WT Dockets 07-16 & 07-30).

[36] *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569 (1995).

[37] *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959); *see also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

[38] *Smith v. United States*, 508 U.S. 223, 233 (1993); *see United States v. Morton,* 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase." (footnote omitted)).

[39] *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997).

"elementary canon of construction that a statute should be interpreted so as to not render one part inoperative."[40]

The Commission also cannot cite M2Z's September 1, 2006 amendment of the Application (in order to incorporate by reference the Forbearance Petition) as a basis for asserting that a written decision by September 1, 2007 denying M2Z's Application would be in compliance with Section 7. Section 1.927 of the Commission's rules expressly allows the filing of amendments to applications in the wireless services.[41] Section 1.927(h) provides, further, that only when application amendments constitute a "major change" as defined in Section 1.929 will the underlying application "be treated as a new application for determination of filing date, public notice and petition to deny purposes." *See* 47 C.F.R. § 1.927(h). Section 1.929 provides a list of application amendments that are classified as "major" and therefore require treatment as a new application for filing date purposes. The list of "major" amendments delineated in section 1.929, however, does not include amendments of the type submitted by M2Z on September 1, 2006. Therefore, the Commission cannot reasonably argue that M2Z's September 1, 2006 amendment of the Application constituted a "major change" requiring a change in the Application's filing date to September 1, 2006 for purposes of Section 7.

Thus, the order's treatment of Section 7 is a basis for reversal, not simply because of the missed deadline, which cannot be remedied by a reversal, but because the Commission will not have followed the critical burden-shifting requirement of Section 7, which it must do contemporaneously with a reasoned review of the record.

Nor can that omission be cured by the release, even if contemporaneously with the draft Order, of an NPRM proposing service and auction rules for the 2155-2175 MHz band. M2Z's Application set forth a very specific proposal for services in the 2155-2175 MHz band.[42] The Commission must thoroughly review that proposal, including the proposed service rules for the NBRS, on the merits, based on the burden-shifting standard set forth in Section 7(a). The issuance of a general service rules NPRM that does not

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[40] *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Aparacor, Inc. v. United States*, 571 F.2d 552, 557 (Ct. Cl. 1978) (It is "a fundamental maxim that a statute should, if possible, be construed so as to give effect to all parts of the statute rather than render some of the language superfluous or nugatory.").

[41] *See* 47 C.F.R. § 1.927(a) (Except in certain inapplicable circumstances, "[p]ending applications may be amended as a matter of right if they have not been designated for hearing or listed in a public notice as accepted for filing for competitive bidding.").

[42] M2Z understands that, inconsistent with the Commission's practice for thorough review of items, an NPRM was circulated on August 24, 2007 one week before the purported deadline for action here.

address or make use of M2Z's proposals would not be sufficient to correct the statutory violations discussed above.

Sections 309(j)(1), (6)(E) and (3)

Section 309(j)(1) of the Act mandates competitive bidding for spectrum licenses only "[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are *accepted*."[43] The Commission, however, has the duty to avoid mutual exclusivity, pursuant to Section 309(j)(6)(E), when doing so would serve the public interest. As Section 309(j)(6)(E) itself makes clear, the Commission's competitive bidding authority must not "be construed to relieve the Commission of the *obligation* in the public interest . . . to avoid mutual exclusivity in application and licensing proceedings."[44] Therefore, notwithstanding the Commission's discretion under Section 309(j)(1) to accept mutually exclusive applications and, where mutual exclusivity exists, award licenses via spectrum auctions, the Commission may do so only when acceptance of mutually exclusive applications is in the public interest, as provided in Section 309(j)(6)(E).[45]

Section 309(j) requires that any Order denying M2Z's Application and Forbearance Petition contain an affirmative determination, applying the standards set forth in Section 309(j)(3), that a process which forces mutual exclusivity in applications for the license M2Z seeks would produce public interest benefits superior to those that would be produced if M2Z's Application and Forbearance Petition were granted.[46] In particular, Section 309(j) requires the Commission to thoroughly analyze M2Z's commitments to: (1) make the NBRS available to the public, without any recurring airtime fees, with downlink speeds of at least 384 kilobits per second ("kbps") and uplink speeds of at least 128 kbps, and accessible to every consumer equipped with low-cost customer devices capable of receiving M2Z's free service; (2) make the NBRS available to every federal, state, county, and municipal public safety organization in the United States, with no limitation on the number of devices that any particular public safety agency could attach to the M2Z network; (3) make family-friendly content filtering

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[43] 47 U.S.C. § 309(j)(1) (emphasis added).

[44] 47 U.S.C. § 309(j)(6)(E) (emphasis added).

[45] *See* 47 U.S.C. § 309(j)(1). The only fair reading of Section 309(j)(1), therefore, is that the Commission may *not* accept mutually exclusive applications if and when doing so would be inconsistent with Section 309(j)(6)(E).

[46] Application at 34-40; M2Z Opposition at 41-47, 54-60; Forbearance Petition at 3-14, 41-45.

technology available to all users of the NBRS, so that parents would have the ability to protect their children from potentially harmful content; and (4) make an annual payment to the U.S. Treasury in the form of a spectrum usage fee equal to five percent of the revenues derived from a premium, subscription-based service that M2Z also would offer over the 2155-2175 MHz band.[47] Any decision to force mutual exclusivity (and its resulting auction of the 2155-2175 MHz spectrum) would also need to explain why in this case an auction is preferable and in the public interest in light of M2Z's commitments.[48] We understand, however, that the Commission's extraordinarily brief Order may omit these necessary components.

In other words, the Commission must avoid mutual exclusivity (and the use of auctions) in the assignment of spectrum licenses if another method of assignment would better serve the public interest. Indeed, Section 309(j)(6)(E) concludes by specifying that the Commission must "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity" in the spectrum licensing process, if it determines that such an approach would better serve its public interest mandate.[49]

Section 309(j)(6)(E) has always been a crucial part of Section 309(j) and remained so after adoption of the amendments to Section 309(j) in the Balanced Budget Act of 1997. Although Congress amended Section 309(j) in 1997,[50] the amendments did not alter the impact of Section 309(j)(6)(E). In fact, the legislative history of the 1997 amendment simply clarifies and amplifies the intent evident on the face of Section 309(j)(6)(E). The Conference Report accompanying the 1997 amendment emphasized that "notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the

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[47] *See* Application at 12. The Commission must also consider the public interest benefit of the NBRS as a third national platform for delivering broadband services throughout the United States. *See id.* at 10.

[48] *See* M2Z Opposition at 47-54; Wilkie Paper "Auctions Are Not A Panacea"; M2Z Forbearance Petition at 45.

[49] *Id*. § 309(j)(6)(E).

[50] The statutory provision previously stated that "[i]f mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum . . . , then the Commission *shall have the authority . . . to grant* such license or permit to a qualified applicant through the use of a system of competitive bidding." 47 U.S.C. § 309(j)(1) (1996) (emphasis added). The current version of the statute indicates that when faced with mutually exclusive applications "the Commission *shall grant* the license or permit to a qualified applicant through a system of competitive bidding." 47 U.S.C. § 309(j)(1) (2000).

Commission[']s obligations under section 309(j)(6)(E)."[51] As the Conference Report explained, "[t]he conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity."[52]

The Commission has previously recognized its obligations under Section 309(j)(6)(E). In its *1997 Balanced Budget Act Order*, which implemented the Section 309(j)(1) amendments, the Commission noted that "notwithstanding the Commission's expanded auction authority, its determinations regarding mutual exclusivity must still be consistent with and not minimize its obligations under Section 309(j)(6)(E)."[53] The *1997 Balanced Budget Act Order* linked the public interest test under Section 309(j)(6)(E) with the guidelines that inform the Commission's design of competitive bidding processes according to the mandates of Section 309(j)(3).[54] Stressing that its obligations under Section 309(j)(6)(E) had been in existence as long as the Commission's auction authority itself, the Commission explained that it "has consistently interpreted this provision to mean that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed therein only when doing so would further the public interest goals of Section

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[51] H.R. Conf. Rep. No. 105-217, at 572 (1997).

[52] *Id*.

[53] *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22709, ¶ 14 (2000) ("*1997 Balanced Budget Act Order*").

[54] *See id*., ¶ 21.

309(j)(3)."[55] The Commission has also relied on Section 309(j)(6)(E) to avoid mutual exclusivity when granting and modifying wireless licenses.[56]

Section 309(j)(3) directs the Commission to consider several specific public interest factors when establishing competitive bidding processes. In light of the Commission's conclusion in the *1997 Balanced Budget Act Order*, these same factors must apply when the Commission considers, in light of M2Z's stated commitments, the public interest benefits of accepting or not accepting mutually exclusive applications for 2155-2175 MHz licenses. M2Z believes that its Application and associated commitments satisfy all of the substantive provisions contained in Section 309(j)(3), including the Commission's mandate to (a) promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays"; (b) promote "economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people"; (c) recover for the public of a portion of the value of the public spectrum resource made available for commercial use; and (d) ensure efficient and intensive use of the electromagnetic spectrum.[57] If, as we believe, the draft

[55] *Id*. The Commission explained as well that the use of competitive bidding processes is not disfavored, that auctions are not subordinate to Section 309(j)(6)(E), and that "avoidance of mutual exclusivity [is not] the paramount goal of the statute." *Id*., ¶¶ 22 – 23. The D.C. Circuit upheld the Commission's line of reasoning in subsequent cases, with the court refusing to expand the savings clause contained in Section 309(j)(6)(E) beyond these limits. The court noted, for example, that "Subsection (j)(6)(E) affirms Congress' view that statutory competitive bidding authority does not wholesale replace 'engineering solutions, negotiation . . . and other means' to avoid mutual exclusivity; [but] it does not . . . forbid resort to competitive bidding unless no other means to resolve mutual exclusivity are available." *Bachow Communications, Inc. v. F.C.C.*, 237 F.3d 683, 691 (D.C. Cir. 2001); *see also id*. at 692 (citing *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) for the proposition that Section 309(j)(6)(E) is not a bar to Commission auctions once the Commission determines that allowing mutually exclusive applications is in the public interest).

[56] *See Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, ¶¶ 73, 85 (2004) ("*800 MHz Re-banding Order*") (noting that "in Section 309(j)(6)(E), Congress recognized that the Commission can determine that its public interest obligation warrants action that avoids mutual exclusivity, and that this obligation extends to 'application and licensing proceedings'" and that "section 309(j)(6)(E) gives the Commission broad authority to create or avoid mutual exclusivity in licensing, based on the Commission's assessment of the public interest"); *see also Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, ¶¶ 227–29 (2003) (justifying Commission decision not to accept applications for a new terrestrial wireless service from parties not currently providing mobile satellite service).

[57] 47 U.S.C. § 309(j)(3)(A)–(B). The four substantive public interest goals recited in Section 309(j)(3), set out below in their entirety, direct the Commission to promote the following objectives:

Order ignores the standards set forth in Section 309(j)(3) in evaluating M2Z's Application, or pays little attention to them in determining whether it would be in the public interest to force an auction and thereby forego the public interest benefits that would result if M2Z's requests were granted, then the draft Order would likely be inconsistent with Sections 309(j)(1), (6)(E) and (3), as well as Commission precedent interpreting the provisions, and therefore in violation of the APA. [58]

Section 10

M2Z's Forbearance Petition seeks forbearance from "specific regulations and any other statutory and regulatory requirements [ ] the enforcement of which would disserve the public interest by delaying the acceptance and grant of M2Z's Application."[59] Any ruling on M2Z's forbearance request must therefore include a thorough analysis of the three-prong forbearance standard set forth in Section 10.[60] It appears, however, that the

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> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
>
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; [and]
>
> (D) efficient and intensive use of the electromagnetic spectrum[.]

Id. § 309(j)(3)(A)–(D). The Application also meets the procedural requirements in paragraph (E), to the extent applicable, because there has been notice of and an opportunity to comment on the Application, and M2Z (as well as other applicants for the spectrum, albeit less thoroughly and successfully) has established a business plan. *See id*. § 309(j)(3)(E).

[58] It should be noted that, in its recent 700 MHz Second Report and Order, the Commission addressed extensively its authority under section 309(j) (3) in responding to arguments that it was without authority to impose "limited openness requirements" on licensees of the 700 MHz C Block. See 700 MHz Second Report and Order at ¶¶ 211, 215. It would indeed be ironic if only a few weeks later, the Commission failed to conduct a similarly robust Section 309(j)(3) review in proceedings where Section 309(j)(3) was required to be central to the Commission's overall analysis.

[59] *See* Forbearance Petition at 2.

[60] *See* 47 U.S.C. § 160.

draft Order is far too brief and superficial to satisfy the requirements of Section 10. Indeed, other forbearance petitions recently acted upon by the Commission have been subject to far more scrutiny and analysis than can possibly be provided in a draft Order of merely six pages. A recent Commission decision granting forbearance to an Alaska carrier in only one study area, for example, extended beyond sixty pages.[61]

Section 10(a) obligates the Commission to "forbear from applying *any* regulation *or any* provision of [the Act] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines" that the situation satisfies the three components of the statutory forbearance test:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[62]

Moreover, Section 10(b) requires that in determining whether forbearance is "consistent with the public interest," the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among [telecommunications] providers."[63]

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[61] *See Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149 (rel. Aug. 20, 2007).

[62] 47 U.S.C. § 160(a) (emphases added); *see also AT&T Inc. v. Federal Communications Commission*, 452 F.3d 830, 832 (D.C. Cir. 2006) (confirming that Section 10(a) "*requires* the Federal Communications Commission to 'forbear' from enforcing communications statutes and regulations in certain specified circumstances") (emphasis added).

[63] 47 U.S.C. § 160(b).

In light of recent judicial precedent, it would be a significant litigation risk for the Commission to reject the Forbearance Petition on a procedural technicality, for containing a contingent request, for lacking in specificity; or reject it by conducting a cursory, superficial or truncated (i.e., incomplete) analysis of the Section 10 standards. In 2005, the D.C. Circuit reviewed a Commission decision on a forbearance petition submitted by SBC (now AT&T) in which the Commission originally denied a petition seeking forbearance from any Title II common carrier regulation applicable to SBC's "IP Platform Services."[64] The Commission reasoned that forbearance pursuant to Section 10 is appropriate only for statutes and regulations that already apply to a service; that consideration of contingent requests would be contrary to the public interest, consuming valuable Commission resources and forcing the rapid adoption of new policies without time for full consideration; and that SBC's petition did not set out with the requisite specificity either the services potentially to be exempted from regulation or the statutory provisions and rules from which SBC sought forbearance.[65] The D.C. Circuit rejected this reading of the statute that essentially would have forbid on procedural grounds any consideration by the Commission of contingent or conditional petitions for forbearance.[66] In doing so, the court emphasized the Commission's public interest obligation to consider the competitive effects of prospective forbearance to eliminate regulatory uncertainty and encourage investment, noting that the Commission's stance would conflict with Section

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[64] *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Service*s, Memorandum Opinion and Order, 20 FCC Rcd 9361 (2005) (the "*SBC Order*").

[65] *See id.*, ¶¶ 5, 6, 14.

[66] *See AT&T Inc.*, 452 F.3d at 835–36 (noting that "the Commission denied SBC's petition on the ground that *all* conditional forbearance requests are, as a procedural matter, contrary to the public interest and thus require no substantive consideration" and finding that such an approach "conflicts with the statute's plain language") (emphasis in original). The D.C. Circuit noted AT&T's "forceful rebuttal" of this proposition, *see id*. at 834, but did not reach the merits of the issue because the Commission had not defended this position in its brief and subsequently withdrew it at oral argument. AT&T argued that the SBC petition sought forbearance from requirements "only to the extent that they apply" to the services subject to the request – using the exact same test for forbearance advanced by the Commission in paragraph 5 of the *SBC Order*. AT&T's brief also noted that the Commission had "acknowledged that forbearance requests are appropriate . . . even when they address rules of unclear application" by proposing in the *Cable Modem Declaratory Ruling* to "alleviate industry uncertainty by conditionally 'forbear[ing] from applying each provision of Title II or common carrier regulation' to cable modem service '[t]o the extent that [this] service may be subject to telecommunications service classification.'" *See* Brief for Petitioner AT&T Inc. at 17, *AT&T Inc. v. Federal Communications Commission*, 2006 WL 173445, (quoting *Cable Modem Declaratory Ruling*, ¶ 95).

10(b) of the Act[67] and virtually read that provision out of the statute altogether by making it possible for the Commission to ignore the potential market benefits of conditional forbearance requests.[68]

It is similarly problematic if the Commission were to fail to conduct a full Section 10 review and analysis prior to the forbearance deadline. As M2Z has previously explained,[69] Section 10 provides, in pertinent part, that "the Commission may grant or deny a petition in whole or in part and *shall explain its decision in writing*."[70] This has been interpreted by the courts to require the Commission to "fully consider" a petition for forbearance within the statutory one-year period and provide a "fully considered analysis" of the petition.[71]

In the same way that the Commission must apply the standards set forth in Section 309(j)(3) to determine whether to reject M2Z's proposal for the avoidance of mutual exclusivity in the process for assigning the license M2Z seeks, these same standards must also be used in evaluating whether M2Z has satisfied the public interest prong of the Section 10. If, as M2Z believes, application of the Section 309(j)(3) standards militate in favor of a determination that mutual exclusivity in 2155-2175 MHz licensing should be avoided, then the Commission will not be able to successfully defend a finding that the public interest prong of Section 10 has not been met. If the Order

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[67] 47 U.S.C. § 160(b) ("In making [forbearance] determinations . . . , the Commission shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.").

[68] *AT&T Inc.*, 452 F.3d at 835.

[69] *M2Z Opposition at* 30 n. 93.

[70] 47 U.S.C. § 160(c)(emphasis added).

[71] *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) ("[U]nder the Commission's view, nothing would stop it from finding that the statutory deadline permits 'fully considered analysis' of only narrow petitions, and thus adopting a rule that any petition seeking forbearance from more than one regulation is contrary to the public interest. This cannot be correct. Nothing in section 10(a)(3) allows the Commission to avoid ruling on the merits of a forbearance petition whenever it finds the statutory deadline inconvenient. Quite to the contrary, section 10(a)(3)'s very purpose is to force the Commission to act within the statutory deadline."); *see also In re Core Communs.*, 455 F.3d 267 (D.C. Cir. 2006) ("Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue the explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation.").

released by the Commission contains in its forbearance analysis any of the deficiencies cited above, then such deficiencies will themselves serve as a basis for determining that the Order violates the APA.

Fifth Amendment's Due Process Clause

A "fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts." [72] The due process clause also forbids arbitrary or irrational decision-making by the government. [73] Based on our understanding of the draft Order, and the unusual circumstances of its development and circulation,[74] there are a number of bases available for establishing a violation of the due process clause in this instance. First, the process established to evaluate M2Z's Application and Forbearance Petition has been seriously flawed. As noted above, the Commission did not release a public notice seeking comment on the Application until more than eight months after it had been submitted. Likewise, it did not issue a public notice seeking comment on the Forbearance Petition until more than five months after it had been submitted. The long delays associated with issuance of the public notices resulted in an extremely truncated process for developing a draft Order. The inequities associated with the process are all the more troubling when one considers that after issuing public notices seeking comment on M2Z's requests, the Commission, in the March Public Notice, provided additional time for parties that oppose M2Z's Application to file in opposition or submit alternative proposals for using the 2155-2175 MHz band.

A truncated review process could have easily been avoided had the Commission's Wireless Bureau acted more reasonably in seeking comment on M2Z's requests. The Commission and Wireless Bureau routinely issue public notices of license applications and forbearance requests. Many of these applications are issued very shortly after the applications are filed.[75] There is no legitimate reason for the extraordinary delay in

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[72] *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (quotation marks and citations omitted).

[73] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005); *see also County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998) (due process clause protects against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

[74] *See* Letter from Erin L. Dozier to Marlene Dortch, WT Docket 07-16 & 07-30 (August 13, 2007 (describing ex parte conversation between Erika Olsen, legal advisor to Chairman Martin, and Michael Meece, consultant to M2Z).

[75] *See, e.g.*, Public Notice Report No. 3356 (Aug. 8, 2007) (issuing public notice on August 8, 2007 for license applications filed between July 30, 2007 and August 3, 2007). *See also* Public Notice, Wireless

releasing the public notices in this instance. Moreover, the parties that have suffered the most from the truncated process are M2Z, its supporters and the public at large. Opponents of M2Z's requests have largely benefited because, where, as in this instance, statutory deadlines apply, the truncated nature of the process makes it exceedingly more difficult for parties to upset the status quo. Because the process used to develop the draft Order was deficient in affording M2Z an amount of procedural due process that was minimally necessary to achieve fairness in this instance, the draft Order, if approved, would be in violation of the due process clause.

Second, based on our understanding of the draft Order, we have serious doubts regarding whether it would allow the Commission to convey adequately its reasoning for rejecting the overwhelming weight of the evidence in favor of M2Z's Application and Forbearance Petition. Without such reasoning, the draft Order, if adopted, would be arbitrary. As noted above, we understand the draft Order is brief. The record compiled in response to M2Z's Application and Forbearance Petition is voluminous, and M2Z and its supporters have gone to great lengths to address every argument raised by their opponents.[76] The Commission cannot possibly convey adequately its reasons for rejecting these showings in a cursory, limited decision. Because the draft Order is likely deficient in its reasoning, the Commission will run the risk of falling short of another requirement of the due process clause if it adopts the draft Order in its present form.

Third, it would be difficult, if not impossible, to reconcile a denial of M2Z's requests with Section 706 and the Commission's publicly stated goals of promoting the ubiquitous deployment of broadband services, especially in rural areas. The existence of such inconsistency, and the apparent lack of analysis addressing it, provides another basis for finding the draft Order deficient under the due process clause. Section 706, which was enacted contemporaneously with the forbearance provisions of Section 10 and is set forth as a note to Section 7, provides a strong basis for granting M2Z's Application and Forbearance Petition and establishing the NBRS, consistent with the service rules and conditions proposed in M2Z's Application. As the Commission has noted, Section 706

Telecommunications Bureau Announces that Applications for Advanced Wireless Services Licenses are Accepted for Filing, 21 FCC Rcd 12005 (WTB Oct. 26, 2007). For a sense of timing for forbearance application public notices, *see* the examples set forth in Appendix II.

[76] Indeed, M2Z's opponents have acknowledged the complex nature of the record before the Commission as three parties sought additional time to respond to M2Z's filings. *See* CTIA - The Wireless Association, :Motion for Extension of Time, WT Docket No. 07-16 (submitted Mar. 29, 2007); *See* Letter from Jennifer M. McCarthy, NextWave Broadband, Inc. to Marlene H. Dortch, FCC Secretary, referencing WT Docket No. 07-16 (dated Mar. 30, 2007); Comments of AT&T, Inc., in Support of Motion for Extension of Time of CTIA - The Wireless Association, WT Docket Nos. 07-16 and 07-30 (dated Mar. 30, 2007).

"directs the Commission to encourage broadband deployment by utilizing 'measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment.'"[77] Moreover, the Court of Appeals for the District of Columbia has held that the Commission may "consider the goals of Section 706" when formulating policy under the Act.[78] Consistent with this understanding, the Commission has taken a wide variety of deregulatory actions to eliminate unnecessary barriers that prevent the rapid deployment of broadband services.[79]

Cognizant of the requirements of Section 706 and recognizing that retail prices affect broadband deployment, the Commission has established a strategic goal to ensure that every American has "affordable access to robust and reliable broadband products and services,"[80] and has identified several specific steps necessary to achieve this goal.[81] Among other things, the Commission has stated that it will "encourage and facilitate an

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[77] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, ¶ 62 (rel. March 5, 2007) (citing 47 U.S.C. § 157 nt.) ("*Local Cable Franchising Order*").

[78] *Local Cable Franchising Order*, ¶ 4 (citing *USTA v. FCC*, 359 F.3d 554, 579–80 (D.C. Cir. 2004)).

[79] *See, e.g., Local Cable Franchising Order*, ¶ 62 (noting the Commission's obligation under Section 706 and stating that "[t]he record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated. Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well"); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶¶ 69, 76 (1998) (noting that Section 706 "directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services" and to "further Congress' objective of opening all telecommunications markets to competition").

[80] *See FCC 2006 – 2011 Strategic Plan* at 5, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf .

[81] *See id.* The Strategic Plan identifies several specific objectives necessary to meet the Commission's broadband goal. It states that the Commission shall: (1) promote the availability of broadband to all Americans; (2) define broadband in a technologically neutral fashion that includes any platform capable of transmitting high-bandwidth intensive services, applications, and content; (3) ensure harmonized regulatory treatment of competing broadband services; (4) encourage and facilitate an environment that stimulates investment and innovation in broadband technologies and services; and (5) continue to monitor the deployment of advanced telecommunications capability in order to provide ongoing national and international policy leadership and consumer education in the emerging broadband area. *Id.* at 5-6.

environment that stimulates investment and innovation in broadband technologies and services."[82]

Without a detailed analysis as to why a rejection of M2Z's Application and Forbearance Petition would be consistent with both the Commission's obligations under Section 706 and the Commission's publicly stated goals for the ubiquitous deployment of broadband services, an Order denying these requests could be adjudged irrational (and therefore in violation of the due process clause) in view of the requirements of Section 706, previous deregulatory actions taken by the Commission in furtherance of Section 706's mandate, the Commission's often and publicly stated policy goals for promoting ubiquitous broadband deployment and the valuable commitments made in M2Z's Application to deploy within record time the nation's third broadband network and make access to such network free to all consumers possessing a low-cost customer device capable of operating on the network.

Section 1

Congress created the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[83] Past Commissions have fulfilled the obligation of Section 1 of the Communications Act by establishing, for example, free over-the-air broadcast television and radio. In light of the fact that M2Z proposes a free broadband Internet access service that will be available nationwide, the Commission is obligated under the Act to give the application due consideration to ensure that it fulfils its congressionally mandated duty to make reasonably priced services "available." As explained throughout this memorandum, reasonable consideration, as required by the statute, has not occurred in the item currently on circulation.

(2) Arbitrary and Capricious

Any brief, unsubstantiated Order from the Commission would also be plainly arbitrary and capricious, given the overwhelming evidence in the record in support of M2Z's Application. As discussed above, the Commission must review the complete

[82] *Id.*

[83] 47 U.S.C. § 151.

record – currently containing over 2,000 filings, all but a handful of which are supportive of M2Z's Application, before issuing a decision. The Commission must also respond to the economic studies filed in support of M2Z's Application, including the study by former Commission Chief Economist Dr. Simon Wilkie, which conservatively estimates that M2Z's entry into the marketplace will generate a direct benefit to American consumers in excess of $18 billion and as much as $32 billion.[84]

A denial of M2Z's Application and Forbearance Petition could also be deemed arbitrary and capricious in light of prior Commission decisions finding that the Commission must under Section 309(j)(6)(E) avoid mutual exclusivity and assign spectrum licenses to specific entities without auction where it is in the public interest (as demonstrated by application of the standards set forth in Section 309(j)(3)) to do so.[85]

(3) Not Supported by Substantial Evidence in the Record

A denial of M2Z's Application would not be supported by substantial evidence in the record. Only a handful of parties filed against M2Z's Application and Forbearance Petition, and those parties were mainly service providers that would have faced competition as a result of M2Z's market entry. As detailed above, M2Z has addressed all of the concerns expressed by those parties. The M2Z Application, along with the overwhelming majority of submissions in the record, attests to the many public interest and consumer welfare benefits of the proposed NBRS. Although opposing parties have had more than 15 months to come up with a better public interest showing than M2Z, none of the alternative proposals for use of the 2155-2175 MHz band – nor any potential proposals that can be imagined by parties filing petitions to deny – have come close to matching the public interest and consumer welfare benefits of the NBRS.

In order to be consistent with the APA, the Commission's Order must address the comments and statements made by numerous parties in support of M2Z's Application, including hundreds of federal, state and local elected officials, leading national advocacy groups such as the Minority Media and Telecommunications Council, ACORN, and the National PTA, and a petition signed by more than 50,000 individuals as part of the Coalition for Free Broadband Now. As mentioned above, these commenters noted and lauded the wide-ranging public interest benefits that grant of M2Z's Application would

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[84] *See* M2Z Application at 26-28; M2Z Opposition at 15-16; M2Z Motion to Dismiss at 35-38; Wilkie Study on Consumer Welfare Impact at 3; Liopiros Study on Value of M2Z Public Interest Commitments at 11-29.

[85] *See, e.g.,* the *800 MHz Re-banding Order* to modify existing licenses held by Nextel, *supra*, n.58.

generate. If the Order issued by the Commission fails to address and refute the overwhelming support for M2Z's requests contained in the record, then the action will be extremely vulnerable to the claim that it violates the APA.

(4) Not Reasonably Explained

As noted above, based on our understanding, the Commission's forthcoming decision on M2Z's Application and Forbearance Petition is unusually short (approximately six pages) and rejects the views and analysis of the overwhelming majority of parties that have submitted pleadings in the proceedings. Given the voluminous record that any decision – grant or otherwise – would need to address, such a brief decision could very well fail to comply with the APA's requirement that Commission actions be reasonably explained.

Conclusion

As the discussion above makes clear, the draft Order that has been circulated to the Commission in an effort to resolve M2Z's Application and Forbearance Petition is seriously flawed and, if adopted in its present form, would pose a significant litigation risk for the Commission. Several bases exist for setting aside a Commission decision adopting the draft Order and, taken together, the deficiencies in the draft Order raise serious questions regarding the Commission's ability to adhere faithfully to the directives of Congress. The deficiencies also raise troubling questions regarding the ability of the Commission to abide by the requirements of fair and predictable decision-making that have historically been the hallmarks of its administrative process. We urge you to step into this deeply flawed process and ensure that the deficiencies discussed above are eliminated and a carefully considered decision, based on the voluminous record in this proceeding, is rendered.

Appendix I: History of the M2Z Proceeding

On May 5, 2006, M2Z filed with the Commission an application requesting an exclusive fifteen-year, renewable license to operate a nationwide wireless broadband network on spectrum in the 2155-2175 MHz band (referred to herein as the "Application," "M2Z Application" or "M2Z's Application").[86] In the Application, M2Z proposed a set of voluntary conditions for M2Z's license that the Commission subsequently could enforce pursuant to its authority under the Communications Act of 1934 (the "Act"). Among those conditions were M2Z's obligations to: (1) make available to the public, without any recurring airtime fees, a new broadband Internet access service known as the National Broadband Radio Service ("NBRS"), with downlink speeds of at least 384 kilobits per second ("kbps") and uplink speeds of at least 128 kbps, and accessible to every consumer equipped with a low-cost customer device capable of receiving M2Z's free service; (2) make the NBRS available to every federal, state, county, and municipal public safety organization in the U.S., with no limitation on the number of devices that any particular public safety agency could attach to the M2Z network; (3) make family-friendly content filtering technology available to all users of the NBRS and (4) make an annual payments to the U.S. Treasury in the form of a spectrum usage fee equal to five percent of the revenues derived from a premium, subscription-based service that M2Z also would offer using the 2155-2175 MHz band.[87] Citing statistics regarding the then-current state of broadband deployment in the U.S., M2Z committed to use its license to deploy a third national platform for delivering retail-based broadband services throughout the U.S.[88]

On September 1, 2006, M2Z filed a Petition for Forbearance ("Forbearance Petition")[89] with the Commission, pursuant to Section 10 of the Act, 47 U.S.C. § 160. In

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[86] *See* M2Z Networks, Inc., Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16, at 2–3 (filed May 5, 2006, and amended Sept. 1, 2006) ("Application").

[87] *See* Application at 12.

[88] *See id.* at 10.

[89] *See* Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(a) and (c) of the Commission's Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-30, at 2 (filed Sept. 1, 2006) (the "Forbearance Petition"). The Commission subsequently solicited comment on the Forbearance Petition and established a pleading cycle for such comments in a separate docket. *See Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its*

its Forbearance Petition, M2Z reiterated the significant public interest benefits to be achieved by grant of its Application and sought Commission forbearance from any rule, provision of the Act, or Commission policy that could be construed as impeding acceptance or Commission grant of the Application.

On January 31, 2007, more than eight months after M2Z's Application was filed, the Wireless Telecommunications Bureau issued a Public Notice (the "Public Notice") accepting the Application for filing, seeking comment on the Application, and inviting alternative proposals to operate in the 2155-2175 MHz band.[90] On February 16, 2007, more than five months after M2Z's Forbearance Petition was filed, the Wireless Telecommunications Bureau issued a public notice seeking comment on the Forbearance Petition.[91] Hundreds of parties thereafter filed supportive comments and other submissions urging the Commission to grant M2Z's Application and Forbearance Petition, as well as submissions urging the Commission to consider the merits of M2Z's proposal in a timely fashion. These commenters lauded the wide-ranging public interest benefits that grant of the Application would generate, including (1) bolstering the competitiveness of small and independent businesses;[92] (2) creating a more competitive

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Application for a License to Provide Radio Service in the 2155-2175 MHz Band, Public Notice, WT Docket No. 07-30, DA 07-736, (Wireless Telecom. Bur. rel. Feb. 16, 2007) (the "Forbearance Public Notice").

[90] *Wireless Telecommunication Bureau Announces that M2Z Networks, Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing*, Public Notice, WT Docket No. 07-16, DA 07-492 (Wireless Telecom. Bur. rel. Jan. 31, 2007) (the "Public Notice").

[91] *Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its Application for a License to Provide Radio Service in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-30, DA 07-736, (Wireless Telecom. Bur. rel. Feb. 16, 2007) (the "Forbearance Public Notice").

[92] *See, e.g.*, Comments of the California Association for Local Economic Development, WT Docket No. 07-16, at 2–3 (submitted Feb. 14, 2007) (noting that widespread governmental interest in deploying broadband stems from recognition that broadband access fosters economic development and that M2Z's innovative proposal will help government expand broadband access using private funds); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket No. 07-16, at 10–11 (submitted Mar. 2, 2007) ("MMTC Comments") (noting that the Internet is crucial to the success of all small and independent businesses, which account for over 99% of all companies, and asserting that "a free, nationwide broadband Internet access service would extend the potential of e-commerce to all businesses."); Comments of The Electronic Retailing Association, WT Docket Nos. 07-16 and 07-30, at 1–2 (submitted Feb. 26, 2007) ("ERA Comments") (noting that connection to the Internet makes available to online entrepreneurs the ability to market directly to the end-consumer in an affordable and direct way through e-mail, websites and advertising); Comments of MAN-n-BAG, WT Docket Nos. 07-16 and 07-30,

broadband marketplace,[93] (3) increasing diversity in the management and ownership of communications outlets,[94] (4) enhancing educational opportunities,[95] (5) bridging the digital divide,[96] (6) supplementing and enhancing public safety communications,[97] (7)

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at 1 (submitted Mar.16, 2007) (highlighting the importance of online distribution channels for small business operators).

[93] *See, e.g.*, Comments of The Center for Digital Future, WT Docket No. 07-16, at 2 (submitted Feb. 27, 2007) (explaining the importance of market competition by highlighting the price drop for DSL service and an associated increase in broadband adoption); Comments of FiberTower Corporation, WT Docket 07-16, at 2 (submitted Mar. 2, 2007) ("Consumers win because they ultimately enjoy all the benefits of enhanced competition including greater choice and lower prices."); ERA Comments at 2 (submitted Feb. 6, 2007) (noting that only 35% of small businesses currently have websites and only 57% use the Internet for business related activities, which "further exemplifies the need for affordable, reliable solutions to the significant, and often times, insurmountable, cost of broadband connectivity"); MMTC Comments at 10–11 (asserting that readily available broadband access is essential for small and independent businesses to remain successful in an increasingly electronic world); Comments of The Latino Coalition, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 22, 2007) ("Latino Coalition Comments") (explaining that most Americans only have two choices for broadband: cable and DSL, which are still cost prohibitive to many Americans).

[94] *See, e.g.*, MMTC Comments at 2, 4 (noting that ("[w]ith one of the most diverse ownership and management teams of any communications business," M2Z is "a model of diversity for other communications businesses to follow").

[95] *See, e.g.*, Comments of Educause, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) ("Ubiquitous broadband Internet access would empower teachers and promote student success by taking the educational experience beyond the walls of the classroom."); Comments of the National PTA, WT Docket No. 07-16, at 2 (submitted Mar. 1, 2007) (asserting that M2Z's proposal is as an "innovative and equitable way to ensure that broadband is an educational resource available to all Americans – parents, children and educators"); Comments of the Higher Education Wireless Access Consortium, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) (supporting M2Z's proposal because M2Z will help bridge the gap of wireless connectivity in the classrooms of those schools with fewer resources); Comments of the League for Innovation in the Community College, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) (reporting that while computer and Internet access has increased, there still remains a substantial information divide with "communities that do not have adequate access to the Internet and technology-based training, resources, and services"); Comments of the College Parents of America, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) (indicating that with the cost of college rising, free broadband service would provide great financial relief to struggling parents and would allow more students to participate in distance learning programs).

[96] *See, e.g.*, Comments of the Association of Community Organizations for Reform Now, WT Docket 07-16, at 1–2 (submitted Feb. 2, 2007) (stating that current Internet providers are more interested in the bottom line through service to wealthier Americans with high monthly subscription rates, while M2Z will solve the problems of broadband availability *and* affordability); Comments of One Economy Corporation, WT Docket No. 07-16, at 2 (submitted Mar. 1, 2007) ("[T]his type of market innovation will further One Economy's mission, benefit an underserved portion of our country, and serve the public interest."); Latino Coalition Comments at 2 (submitted Mar. 22, 2007) (citing National Center for Education Statistics

promoting spectral efficiency,[98] and (8) protecting children from objectionable online materials,[99] among many others.

On March 2, 2007, various parties filed a total of ten petitions to deny or other submissions opposing grant of the Application, with most of these coming from incumbent wireless carriers and their representatives, or from parties filing alternative proposals or suggesting other uses of the 2155-2175 MHz band.[100] Five such alternative proposals were filed on that same day.[101]

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showing that only 44% of Hispanic children use the Internet at school, compared to 59% of all students, and arguing that "M2Z Networks offers a legitimate opportunity to shrink the digital divide and provide real opportunities for the Latino community to take advantage of the incredible educational and economic development opportunities available on the Internet and to develop skills and compete for jobs in the information economy").

[97] *See, e.g.*, Comments of the National Troopers Coalition, WT Docket 07-16, at 1 (submitted Feb. 6, 2007) ("M2Z's proposed network will provide another layer of redundancy to bolster existing and planned public safety-operated networks and help law enforcement stay operational in disasters.").

[98] Comments of Alion Science & Technology, WT Docket Nos. 07-16 and 07-30, at 2 (submitted Mar. 2, 2007) ("Alion Science & Technology Comments") (concluding, after review of M2Z's proposal, that "M2Z's proposed network will use the most spectrally efficient technologies that are currently available for commercial radio systems").

[99] *See, e.g.*, Comments of Most Reverend Paul S. Loverde, WT Docket No. 07-16, at 2 (submitted Mar. 2, 2007) (emphasizing the importance of advancements like M2Z's network level filter to protect families from Internet pornography); Comments of United Families International, WT Docket Nos. 07-16 and 07-30, at 1–2 (submitted Mar. 16, 2007) (supporting access to "clean" wireless broadband for American families); Comments of Internet Keep Safe Coalition, WT Docket No. 07-16, at 2 (submitted Mar. 1, 2007) (expressing approval of M2Z's network-level filtering of indecent and pornographic material); Comments of Enough is Enough, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 13, 2007) ("By making a commitment to use highly effective network based filtering, M2Z has found an innovative balance between spurring the rapid adoption of high speed internet service and protecting children and families from on line pornography and sexual predators.").

[100] On March 2, 2007, the Commission received a total of seven pleadings formally styled as petitions to deny the Application, as well as two submissions styled as Comments and one pleading captioned as an Opposition. *See* AT&T Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("AT&T Petition to Deny"); CTIA – The Wireless Association, Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("CTIA Petition to Deny"); Petition to Deny of Motorola, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007) ("Motorola Petition to Deny"); NextWave Broadband Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("NextWave Petition to Deny"); Petition to Deny of T-Mobile USA, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007) ("T-Mobile Petition to Deny"); Petition to Deny of Verizon Wireless, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("Verizon Wireless Petition to Deny"); Wireless Communications Association International, Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("WCA Petition to Deny"); Comments of the Consumer Electronics Association,

On March 9, 2007, the Wireless Telecommunications Bureau, deviating from the Commission's established rules and procedures,[102] issued a public notice (the "March Public Notice") establishing a pleading cycle that extended the deadline for petitions to deny and other filings pertaining to the Application.[103] Three additional petitions to deny or comments opposing grant of the Application were filed prior to the March 16 deadline established in the March Public Notice,[104] along with one additional alternative proposal submitted by a party that also filed a petition to deny.[105]

On March 26, 2007, pursuant to the pleading cycle established in the March Public Notice, M2Z submitted an Opposition which responded fully to the arguments made in the petitions to deny and various other submissions filed in response to M2Z's

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WT Docket No. 07-.16 (submitted Mar. 2, 2007) ("CEA Comments"); Comments of Leap Wireless International, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007) ("Leap Wireless Comments"); Opposition of EchoStar Satellite L.L.C., WT Docket No. 07-16 (submitted Mar. 2, 2007) ("EchoStar Opposition").

[101] *See* Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("Open Range Proposal"); Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("NextWave Proposal"); Application of Commnet Wireless, LLC for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("Commnet Proposal"); Application of NetfreeUS, LLC for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("NetfreeUS Proposal"); Application of McElroy Electronics Corporation for a Nationwide 2155-2175 MHz Band Authorization, WT Docket No. 07-16 (submitted Mar. 2, 2007) ("McElroy Proposal").

[102] The Commission's rules provide that petitions to deny an application subject to Section 309(d) of the Act must be filed no later than thirty days after the date of the public notice listing the application as accepted for filing. *See* 47 C.F.R. § 1.939(a)(2).

[103] *Wireless Telecommunication Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-16, DA 07-987 (Wireless Telecom. Bur. rel. Mar. 9, 2007) (the "March Public Notice").

[104] *See* Consolidated Petition to Deny and Comments of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 15, 2007) ("TowerStream Petition to Deny"); Consolidated Petition to Deny and Comments of the Rural Broadband Group, WT Docket No. 07-16 (submitted Mar. 16, 2007) ("Rural Broadband Group Petition to Deny"); Comments of the Information Technology Industry Council, WT Docket No. 07-16 (submitted Mar. 16, 2007) ("ITI Comments").

[105] Proposal of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 16, 2007) ("TowerStream Proposal").

Application.[106] It also filed a Consolidated Motion to Dismiss Alternative Proposals. Replies were submitted in response to the M2Z's Opposition on April 3, 2007. M2Z filed an extensive *Ex Parte* Response to replies and filings requesting denial of M2Z's requests on April 16, 2007.[107] It has also filed several *ex parte* notices since that time. All told, over 2,000 filings have been submitted in the two proceedings that are the subject of the draft Order on circulation at the Commission.

[106] *See* M2Z Opposition in WT Docket No. 07-16 (March 26, 2007)("Opposition").

[107] *See* M2Z Networks, Inc. *Ex Parte* Response to Replies and Oppositions, WT Docket Nos. 07-16 & 07-30 (filed Apr. 16, 2007) ("M2Z Reply Comments").

Appendix II: Timeliness of Public Comment on Forbearance Petitions

NO.	PETITION	FILING DATE	PUBLIC NOTICE DATE
1	***Verizon Telephone Companies*** for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas (WC Docket No. 06-172)	Sept. 6, 2006	Sept. 14, 2006 (DA 06-1869) (8 days)
2	***Frontier and Citizens ILECs*** for Forbearance From Title II and Computer Inquiry Rules With Respect to Their Broadband Services (WC Docket No. 06-147)	Aug. 4, 2006	Aug. 23, 2006 (DA 06-1671) (19 days)
3	***Embarq Local Exchange Operating Companies*** Petition for Forbearance From Application of Computer Inquiry and Certain Title II Common-Carriage Requirements (WC Docket No. 06-147)	July 26, 2006	July 28, 2006 (DA 06-1545) (2 days)
4	***BellSouth Corporation*** Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Its Broadband Services (WC Docket No. 06-125)	July 20, 2006	July 21, 2006 (DA 06-1490) (1 day)
5	***AT&T Inc.*** Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services (WC Docket No. 06-125)	July 13, 2006	July 19, 2006 (DA 06-1464) (6 days)
6	***Qwest Corporation*** Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services (WC Docket No. 06-125)	June 13, 2006	July 19, 2006 (DA 06-1464) (20 days)
7	***AT&T Inc.*** Petition for Forbearance with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services (WC Docket No. 06-120)	June 2, 2006	June 23, 2006 (DA 06-1302) (21 days)
8	***ACS of Anchorage, Inc.*** Petition for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area (WC Docket No. 06-109)	May 22, 2006	June 12, 2006 (DA 06-1263) (21 days)

NO.	PETITION	FILING DATE	PUBLIC NOTICE DATE
9	***Iowa Telecom Services, Inc.*** Petition for Forbearance from Enforcement of Sections 36.01-631, 54.305, 54.309, 54.313, and 54.314 of the Commissions Rules to the Extent Necessary to Permit Iowa Telecom to Be Eligible for High-Cost Universal Service Support under the Non-Rural High-Cost Mechanism (WC Docket No. 05-337)	May 8, 2006	June 2, 2006 (DA 06-1164) (25 days)
10	***Core Communications, Inc.*** Petition for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules (WC Docket No. 06-100)	April 27, 2006	May 5, 2006 (DA 06-989) (8 days)
11	***Verizon Telephone Companies*** Petition for Forbearance from Certain Dominant Carrier Regulations for In-Region, Interexchange Service (WC Docket No. 06-56)	Feb. 28, 2006	Mar. 31, 2006 (DA 06-618) (31 days)
12	***BellSouth Telecommunications, Inc.*** For Forbearance From Enforcement of Certain of the Commission's Cost Assignment Rules (WC Docket No. 05-342)	Dec. 6, 2005	Dec. 22, 2005 (DA 05-3185) (16 days)
13	***Qwest Communications International Inc.*** for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply after Section 272 Sunset (WC Docket No. 05-333)	Nov. 22, 2005	Dec. 8, 2005 (DA 05-3163) (16 days)
14	***Qwest Communications International, Inc.*** Petition for Forbearance from Enforcement of the Commission's Circuit-Flipping Rules as They Apply to Post-Merger Verizon/MCI and SBC/AT&T (WC Docket No. 05-294)	Oct. 4, 2005	Nov. 3, 2005 (DA 05-2895) (30 days)
15	***ACS of Anchorage, Inc.*** for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area (WC Docket No. 05-281)	Sept. 30, 2005	Oct. 15, 2005 (DA 05-2709) (15 days)